In the Supreme Court

OF THE

United States

FILED
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OCTOBER TERM, 1934

No.

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent,

and

GUSTAV SCHOENAMSGRUBER,
Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,
Respondent.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

HARRY H. SEMMES,
VINCENT W. HALLINAN,
EMMETT R. BURNS,
WILLIAM F. HERRON,
369 Pine Street, San Francisco, California,
Proctors for Petitioners.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit,

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Hildegard Schoenamsgruber by Gustav Schoenamsgruber and Gustav Schoenamsgruber, the petitioners above named, respectfully shows to Your Honors:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

There could be no better or more concise statement of the matter involved than that of the Circuit Court of Appeals in the opinion written in this cause by Judge Wilbur (Apostles on Appeal, page 162, 70 Fed. (2d) 234), which is as follows:

"Two libels were filed in rem against the motorship 'Oakland', and in personam against the Hamburg American Line, a corporation, as owner of the motorship 'Oakland'. One of the libels was brought by Hildegard Schoenamsgruber, a minor, by Gustav Schoenamsgruber as her guardian ad litem, for $250,000 damages, and the other was brought by Gustav Schoenamsgruber on behalf of himself and his wife as the parents of said minor child for $50,000 damages. Both libels are based upon an alleged breach of a maritime contract for the carriage of the minor child, Hildegard Schoenamsgruber, from Hamburg, Germany, to San Francisco, California. The alleged breach consisted of the alleged misconduct of a cer-

tain chief cook aboard ship resulting in the infection of the six-year old daughter with a venereal disease.

"The libellees, in addition to denying the allegations of the libels, allege that the contract of transportation was entered into with the mother of the minor child and that it contained an agreement to arbitrate any complaints based upon a breach of the terms of the contract. The agreement was as follows:

'Complaints with respect to failure to fulfill this contract, claims for damages, etc., must be presented by the passenger immediately after arrival at the overseas port of destination to the agent of the Hamburg American Line. In the event an agreement cannot be reached thereby, then the decision of the German Consul acting at the port of disembarkation shall be final and his decision shall be accepted, both parties waiving recourse to the Courts at law.'

"The two libels were consolidated for trial and on December 5, 1933, the trial Court made an order referring the controversy to the German Consul at San Francisco as arbitrator and directed that the proceeding be stayed pending the arbitration, and further provided:

'It is further ordered and decreed that this Court retain jurisdiction of the above entitled action to make such orders and enter such decrees as are required or contemplated by the United States arbitration law, or otherwise permitted or required by law.'

"This order was evidently based upon 9 U. S. C. A., Sec. 8, which is as follows:

'Proceedings begun by libel in admiralty and seizure of vessel or property. If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the Court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.'

"On the 14th day of December, notice of appeal from this order was given.

"The libellees moved for dismissal of the appeal on the ground that the order appealed from is not an appealable order because it is not final in the proceedings."

The Circuit Court of Appeals held that the order directing the parties to proceed to arbitration was a non-appealable interlocutory order and entered a decree dismissing the appeal in each case. (Apostles on Appeal, pages 167, 168.)

Believing that this decision of the Circuit Court of Appeals was error, your petitioners pray for a writ of certiorari to review the same.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) That the Honorable Circuit Court of Appeals has entered a decision herein in conflict with the decision of another Circuit Court of Appeals on the same matter; to-wit, the decision of the Circuit Court of Appeals for the Second Circuit in *Krauss Bros. v. Bossert & Sons,* 62 Fed. (2d) 1004,

"that the decree is final and appealable."

(See Rule 38, Sec. 5, Subd. B of the Rules of the Supreme Court.) That in a previous decision in *California Prune and Apricot Growers Ass'n v. Catz American Co.,* 60 Fed. (2d) 788, the Circuit Court of Appeals for the Ninth Circuit, which rendered the decision sought to be reviewed, treated an order directing the submission of a controversy to arbitration as a final order and disposed of the question on the merits, though it did not directly pass upon the question of the appealability of the order.

(2) That the said Circuit Court of Appeals has decided an important question of general law in a way probably untenable, and in conflict with the weight of authority in this, to-wit: that the only cases cited in the opinion of the Circuit Court of Appeals involving the appealable character of an order directing the parties to proceed to arbitration, pronounce a rule opposite to the decision of the Circuit Court of Appeals in the instant case, and reach a contrary conclusion. (See Justice Cardozo's opinion in *Marchant v. Mead Mfg. Co.,* 252 N. Y. 284, 169 N. E. 386,

and *Hosiery Mfg. Co. v. Goldston,* 238 N. Y. 22, 143 N. E. 779.)

(3) That the said Circuit Court of Appeals in the decision aforesaid, has decided an important question of Federal law which has not been, but should be, settled by this Court; to-wit, whether a decree in admiralty directing the parties to proceed to arbitration is a final and appealable or an interlocutory and non-appealable order.

(4) That the said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedure and has so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision, to-wit, that said Circuit Court of Appeals by treating the order of the District Court as non-appealable, has sanctioned an order of the District Court, which, in effect, decrees the specific performance of a purported arbitration provision which is void on its face, because it shows on its face that it is an attempt to oust the Courts of their jurisdiction.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said Circuit Court of Appeals to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases entitled as above, and that the said decree of said Circuit Court of Appeals may

be reversed by this Honorable Court, and that your petitioners may have such other and further relief as to this Honorable Court may seem meet, just and proper in the premises; and your petitioners will ever pray.

Dated, San Francisco, California,
September 19, 1934.

HILDEGARD SCHOENAMSGRUBER,
By Gustav Schoenamsgruber,
her guardian,
GUSTAV SCHOENAMSGRUBER,
Petitioners.

HARRY H. SEMMES,
VINCENT W. HALLINAN,
EMMETT R. BURNS,
WILLIAM F. HERRON,
Proctors for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for the petitioners in the above entitled cause and that in my judgment the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
September 19, 1934.

HARRY H. SEMMES,
Of Counsel for Petitioners.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

DATE OF JUDGMENT OF TRIAL COURT.

The judgment of the trial Court (Order Directing Parties to Proceed to Arbitration) was entered December 5, 1933. (Apostles on Appeal, page 9.)

II.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals was rendered April 10, 1934, and is cited in the Federal Reporter in 70 Fed. (2d) 234, and in the transcript of the record (Apostles on Appeal) at page 162.

III.

DATE OF JUDGMENT OF APPELLATE COURT.

The judgment of the Appellate Court (Decree of Dismissal) was entered April 10, 1934. (Apostles on Appeal, pages 168, 169.)

A petition for a rehearing was filed, and the date of the denial thereof is the 11th of July, 1934. (Apostles on Appeal, pages 169, 170.)

IV.

THE JURISDICTION.

The statutory provision under which jurisdiction is invoked is Section 240 of the Judicial Code, 28 U. S. C. A., Section 347.

V.

STATEMENT OF THE CASE.

A full statement of the case has been given under a like heading in the petition, and, in the interest of brevity, the statement is not repeated at this point.

VI.

SPECIFICATION OF ERRORS.

(1) The Honorable Circuit Court of Appeals erred in holding and deciding that the order or decree of the District Court directing the parties to proceed to arbitration was an interlocutory and non-appealable order.

(2) The Circuit Court of Appeals erred in holding and deciding that because the question was not before it, it could not consider the contention of the libelant and appellant that the so-called arbitration agreement was void on its face, and was not binding upon the libelant.

VII.

ARGUMENT.

SUMMARY OF ARGUMENT.

I. THE DECISION BELOW IS CONTRARY TO AND IN CONFLICT WITH ALL THE PRIOR FEDERAL AND STATE COURT DECISIONS TOUCHING THE APPEALABLE CHARACTER OF A DECREE DIRECTING THE PARTIES TO PROCEED TO ARBITRATION.

II. THE DECISION BELOW IGNORES THE WELL SETTLED AND UNIVERSAL PRINCIPLE OF GENERAL LAW THAT AN AGREEMENT TO ARBITRATE, WHICH ON ITS FACE ATTEMPTS TO OUST THE COURTS OF THEIR JURISDICTION, IS VOID.

I.

THE DECISION BELOW IS CONTRARY TO AND IN CONFLICT WITH ALL THE PRIOR FEDERAL AND STATE COURT DECISIONS TOUCHING THE APPEALABLE CHARACTER OF A DECREE DIRECTING THE PARTIES TO PROCEED TO ARBITRATION.

No decision is cited in the opinion of the Circuit Court of Appeals, nor was any cited by counsel for respondents in the proceedings below, which holds that an order or decree directing the parties to proceed to arbitration is interlocutory and non-appealable. The pertinent decisions are all to the contrary. The Circuit Court of Appeals of the Second Circuit in *Krauss Bros. v. Bossart & Sons,* 62 Fed. (2d) 1004, reaching a conclusion directly contra to the Circuit Court of Appeals for the Ninth Circuit in the instant case, says:

> "We held in *Marchant v. Mead-Morrison Co.,* 29 F. (2d) 40, that such a suit could not be removed to a federal court after the arbitrators had been appointed and had made their award, because the proceeding is single until its conclusion. It does not follow that the order appointing arbitrators is not appealable under section 225 of title 28. **The purpose of arbitration is essentially an escape from judicial trial; the court takes a hand only so far as some sanction**

is necessary to compel the performance of the agreement to adopt the means provided. It is true that under section 9 of title 9 (U. S. C. A.), the successful party may enforce the award by judgment on which execution will go under section 13. But the judgment follows automatically unless the award has been vacated under section 10, and that is an independent application. **So far as the arbitration proceeding itself is concerned, the last deliberative action of the court is the appointment of arbitrators who thereupon take over the controversy and dispose of it.** Their disposition is not, properly speaking, reviewed by the court, in spite of possible disturbance under sections 10 and 11. **It seems to us, therefore, that the decree is final and appealable."**

In *Marchant v. Mead Mfg. Co.,* 252 N. Y. 284, 169 N. E. 386, Mr. Justice Cardozo of this Court, who was at that time Chief Justice of the New York Court of Appeals, says:

> **"An order for the specific performance of an agreement to arbitrate a controversy is one that finally determines a special proceeding. The proceeding thus ended is not a part of the arbitration that is thereby set in motion. It is subject to direct review as a separable controversy. Like any other final order, the mandate, unless void, is not assailable collaterally."**

In *Hosiery Mfg. Corp. v. Goldston,* 238 N. Y. 22, 143 N. E. 779, the Court at the very beginning of the opinion says:

> **"A motion is made to dismiss the appeal on the ground that the order appealed from is not a**

> **final order. An order to proceed to arbitration under an arbitration agreement is a final order."**

In the case of *In re Utility Oil Corp.*, 69 Fed. (2d) 524, the Circuit Court of Appeals of the Second Circuit considered on the merits an appeal from an order denying a petition to compel a party to proceed to arbitration; and the Circuit Court of Appeals for the Ninth Circuit admits in this case, that in *California Prune and Apricot Growers' Ass'n. v. Catz American Co.*, 60 Fed. (2d) 788, it entertained an appeal from an order of the District Court directing the submitting of a controversy to arbitration, and that

> **"the order on its face appeared to be a final order and was treated as such by the parties and by the court."**

We submit that the decision of the Circuit Court of Appeals in this cause is at variance with all prior decisions of State and Federal Courts.

II.

THE DECISION BELOW IGNORES THE WELL SETTLED AND UNIVERSAL PRINCIPLE OF GENERAL LAW THAT AN AGREEMENT TO ARBITRATE, WHICH ON ITS FACE ATTEMPTS TO OUST THE COURTS OF THEIR JURISDICTION, IS VOID.

The so-called arbitration agreement is void, invalid and unenforcible because it contains the provision that the decision of the German Consul shall be final,

> "both parties waiving recourse to the courts of law." (Apostles on Appeal, pages 45, 163.)

Parties will not be permitted, by agreement to submit to arbitration, to oust the jurisdiction of the Courts, whether the agreement relates to existing differences or to those which may arise in the future.

5 *Corpus Juris* 20.

That the so-called United States Arbitration Act (U. S. C. A., Tit. 9, Sec. 8) has no application to such a provision as the one under consideration, is apparent from the following language in *Re Thurston,* 48 Fed. (2d) 578:

> "By section 9 of the act the decree might be entered if the parties had stipulated in their policy for arbitration and that **judgment of the court should be entered upon the award made pursuant to the arbitration. But here the parties did not bring their dispute within either section 8 or section 9 of the Act. On the contrary, as above pointed out, they stipulated that the report of the umpire would be conclusive upon them. The other sections of the United States Arbitration Act are inapplicable here.**"

See also:

The Kensington, 183 U. S. 263, 46 L. Ed. 190;

Guarantee Trust & Safe Dep. Co. v. Green Cove etc. R. R. Co., 139 U. S. 137;

Potomac Steamboat Co. v. Baker Salvage Co., 123 U. S. 40.

The Circuit Court of Appeals by reason of its decree dismissing the appeal, has likewise refused to

consider the important question whether the so-called arbitration agreement could be binding upon the petitioner Hildegard Schoenamsgruber, who is a minor.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the foregoing important questions may be decided and finally determined by this Court, and that to such an end a writ of Certiorari should be granted; that this Court should review the decision of the Circuit Court of Appeals, **and upon such review hear and determine the entire cause**; and that, in any event, the decree of the Circuit Court of Appeals should be reversed, and the cause remanded with directions to the Court below to hear and determine the several appeals from the District Court on the merits.

Dated, San Francisco, California,
September 19, 1934.

HARRY H. SEMMES,
VINCENT W. HALLINAN,
EMMETT R. BURNS,
WILLIAM F. HERRON,
Proctors for Petitioners.